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No. 88-962

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

MARGARET VARMA, *et al.*,

Petitioners,

–v.–

EDWARD J. BLOUSTEIN, *et al.*,

Respondents.

RUTGERS COUNCIL OF AAUP CHAPTERS,

Petitioner,

–v.–

EDWARD J. BLOUSTEIN, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION

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28 pp

QUESTION PRESENTED

1. Did the courts below correctly conclude, as a matter of fact and law, that petitioners did not have a constitutionally-protected property/liberty interest in the tenure review procedures and criteria at Rutgers, The State University of New Jersey?

PARTIES TO THE PROCEEDINGS

AND RULE 28.1 LIST

The parties to the proceedings below were petitioners Margaret Varma, on behalf of herself and "all others similarly situated", and Rutgers Council of AAUP Chapters, and respondents Edward J. Bloustein (President of Rutgers, The State University of New Jersey ("University" or "Rutgers")), T. Alexander Pond (Executive Vice President of Rutgers), Norman Samuels (Provost of the Newark campus at Rutgers), James Young (former Provost of the Newark campus at Rutgers), Walter Gordon (Provost of the Camden campus at Rutgers), Kenneth Wheeler (former Provost of the New Brunswick campus at Rutgers), Jean Parrish (former Acting Provost of the New Brunswick campus at Rutgers), Susan A. Cole (Vice President for University Administration and Personnel at Rutgers), Elizabeth Mitchell (former Assistant Vice President for Faculty Affairs at Rutgers), Robert Pack (Associate Provost for Personnel at the New Brunswick campus at Rutgers), Linda Stamato (former Member of the Rutgers Board of Governors), Donald Dickerson (former Member of the Rutgers Board of Governors), Floyd Bragg (Member of the Rutgers Board of Governors), Sanford Jaffe (former Member of the Rutgers Board of Governors), Robert Kaplan (former Member of the Rutgers Board of Governors), Harold Perl (Member of the Rutgers Board of Governors), Norman Reitman (Member of the Rutgers Board of Governors), Lawrence S. Schwartz (former Member of the Rutgers Board of Governors), David Werblin (Member of the Rutgers Board of Governors), Adrienne Anderson (Member of the Rutgers Board of Governors), Michael Bongiovanni (Member of the Rutgers Board of Governors), Peter Cartmell (Member of the Rutgers Board of Governors), Anthony Cicatiello (Member of the Rutgers Board of Governors), James Usry (Member of the Rutgers Board of Governors), Walter Wechsler (Member of the Rutgers Board of Governors), Rutgers, The State University of New Jersey, and the Promotion Review Committee at Rutgers. Several professors (Hans Fisher, Noemie Koller, Richard Poirier, Paul Fussell,

Lawrence Fisher, Jane Scanlon, Harvey Feder, and Amelie Rorty) were named as defendants in petitioners' original complaint but were not named as defendants in subsequently-filed amended complaints.

All of the individual respondents below were sued individually and in their corporate capacities.

Rutgers is a body corporate and politic under the laws of New Jersey and is an instrumentality of the State of New Jersey. N.J.S.A. 18A:65-2. Rutgers has no parent company and no subsidiaries. The following not-for-profit corporations are affiliates of Rutgers: The Corporation for the Application of Rutgers Research; The Rutgers University Foundation; and The Rutgers Research and Educational Foundation.

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RESPONDENTS' BRIEF IN OPPOSITION

Respondents respectfully request that this Court deny the petition for writ of certiorari. As explained more fully *infra*, there is no conflict among the circuit courts or with the constitutional principles set forth by this Court. All the circuit courts that have addressed the issue presented here have unanimously held that nontenured faculty members do not have a constitutionally-protected property/liberty interest in the tenure review procedures and criteria at state institutions of higher education. These circuit decisions as well as the decisions of this Court have rejected petitioners' contention that they have a constitutional entitlement to the grant of tenure.

STATEMENT OF THE CASE

A. Proceedings Below

In their complaints, petitioners Margaret Varma, on behalf of herself and others similarly situated, and Rutgers Council of AAUP Chapters ("AAUP") alleged that respondents failed to evaluate faculty candidates for tenure according to the procedures and criteria set forth in the University Regulations ("Regulations"), the University Academic Reappointment/Promotion Instructions ("Instructions"), and Article X of the collectively-negotiated agreement between the University and the AAUP ("Agreement"). Petitioners contended that Ms. Varma and the purported class have a constitutionally-protected interest, akin to a property interest, in the procedures and criteria provided by the aforesaid documents. Petitioners asserted that the alleged failure to act in accordance with said Regulations, Instructions, and Agreement violated their rights to due process under the Fourteenth Amendment.

In response to an earlier opinion of the Third Circuit in this case,[1] petitioners abandoned their original claim and instead argued before the trial court and then the Third Circuit that there existed among faculty members an "expectation" — a "common understanding" — that "the regulations and the Senate Statements . . . mean that candidates shall be granted tenure if they fulfill the criteria as defined by the achievements of past successful candidates in the performance of their assigned duties" (JA600-601; PA56).[2] Petitioners' argument was premised on their affiant's belief that "tenure or promotion *will* be granted, or is 'automatic', if one fulfills the criteria, as generally understood, in the performance of one's duties" (*id.*). However, all the relevant documents — all of which were before the courts

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[1] *Kovats v. Rutgers, The State Univ.*, 822 F.2d 1303, 1314 (3d Cir. 1987) ("[P]romises of specific procedures do not create interests protected by the Due Process clause. *** Varma's claim would have to be based on more than the regulations setting out procedures for tenure evaluations."), *reprinted in* Petitioners' Appendix D, p.41.

[2] References herein to "JA" are to pages of the Joint Appendix filed in the Third Circuit. References to "PA" are to pages of the appendix to the Petition.

below — explicitly dispelled the idea that a nontenured faculty member is entitled to "automatic" tenure.

After reviewing the documentary evidence, the courts below held that petitioners' unsubstantiated claims were untenable in the face of the explicit written guidelines that did not place "the significant substantive restrictions on University discretion in tenure appointments required to create a protected property interest" (PA10-11). *Varma v. Bloustein*, No. 84-2332 (D.N.J. Jan. 12, 1988), *aff'd without op.*, 860 F.2d 1075 & 1077 (3d Cir. 1988).

B. Facts

In evaluating a faculty member for promotion and tenure, the evaluators do not judge the candidate in a vacuum or on the basis of one or two objective, hard-and-fast rules. Rather, a candidate's performance is evaluated on the basis of a multitude of subjective factors.[3] University Regulation 60.2a provides:

> Those responsible for academic appointments, reappointments, and promotions are to (1) base their *recommendation* of professional qualifications as defined in paragraph 3.30, page 50.9, without discrimination because of race, religion, sex, national origin, or views on any subject; (2) seek excellence; (3) utilize the judgments of faculty peers, normally including some faculty at other institutions where the position ordinarily carries tenure; (4) utilize opinions of students, especially those with majors in the appropriate department. [PA47; JA220 (emphasis added)]

University Regulation 3.30 adds:

> Promotions to higher ranks *may* be made in recognition of teaching effectiveness, scholarly or creative activity, research accomplishments, professional activity, and gen-

[3] The promotional criteria are established by and are within the sole province of the University. JA481, 295, 597; N.J.S.A. 18A:65-25(h); *Snitow v. Rutgers Univ.*, 103 N.J. 116, 124, 510 A.2d 1118, 1122 (1986). University Regulation 50.0 explicitly provides that "[n]o rule or regulation shall be so construed as to infringe in any way upon the powers and authority of the [University's] Board of Governors" (JA481).

eral usefulness to the University.[4] The weight to be given to each of these factors will be determined in the light of the duties required and to be required of the appointee.[5]

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[4] These criteria are not unique to the University. They are, in fact, the "traditional academic criteria" for tenure. *Keddie v. Pennsylvania State Univ.*, 412 F. Supp. 1264, 1269 n.2 (M.D. Pa. 1976). *Accord Beitzell v. Jeffrey*, 643 F.2d 870, 872 (1st Cir. 1981) (the "classical tenure requirements").

[5] PA46; JA218 (emphasis and footnote added). Petitioners claim that instead of applying the five criteria set forth in Regulation 3.30, the University has adopted new, secret criteria, such as: does the faculty member's work "impact" on his or her profession; "quantity of research"; and the existence of "important original contributions" (PA56; JA601). Their sole support for this claim is the conclusory, hearsay affidavit of Wells Keddie (*id.*). It is clear, however, from a review of the published documents and case law, that a faculty member's "impact" on his discipline, his "productivity", and his "originality" are relevant, legitimate, and articulated standards for determining whether a faculty member has met the five criteria.

Thus, during the tenure review process, the University specifically requests the outside evaluators to give their "assessment of the *originality* and *the impact* on [the candidate's] field of [the candidate's] research and publication, [the candidate's] scholarly or creative *productivity*, and the quality of [the candidate's] other contributions to the profession" (JA248-249 (emphasis added)). The letters of evaluations "are an important contribution to the determination of whether the candidate has achieved the professional standing in comparison with colleagues in the field elsewhere" (JA248-249, 242). The University Senate Policy With Respect to Academic Appointments and Promotions advises, *inter alia*, that faculty members "should maintain an active interest in the advances and current thinking of their subject[s]" and must keep informed about and contribute to the advances in their chosen fields (PA59-61; JA239-242). And the Corson Committee Report, so heavily relied upon by petitioners, stresses a basic reality of higher education: tenure candidates, *inter alia*, "must be at the leading edge of their individual fields", "must be the very best scholars and investigators in their respective fields", must produce a work product that "influence[s] the work of others in similar fields", and "should assume from the beginning that research productivity and scholarly achievement are the most important considerations in achieving tenure" (JA621, 624, 629).

It is indeed surprising that petitioners would claim that "impact", "quantity", and "originality" are foreign concepts in higher education. That claim is belied by the governing University documents, the education cases cited herein, and petitioners' affiant's own experience when he was denied tenure at The Pennsylvania State University. *See Keddie*, 412 F. Supp. at 1280-81, where the evaluators found, *inter alia*, that Professor Keddie had "no significant research in progress and . . . evidence[d] no inclination to begin anything truly 'new.' "

The subjective and general nature of the criteria set forth in Regulation 3.30 is recognized in the University Senate Policy With Respect to Academic Appointments and Promotions:[6]

> It is *exceedingly difficult* to measure and judge the various areas of activity [of a faculty member]. ***
>
> Such *subjective judgment* by persons competent to evaluate duties, responsibilities, services, and accomplishments will protect the interests of professors themselves, the department, the college, the University, and the students *better than any objective rating* that could be devised.[7]

Moreover, a candidate who meets the criteria of Regulation 3.30 is not guaranteed promotion and tenure. The discretionary language of Regulation 3.30 demonstrates that. Other factors are considered.[8] As the University Senate has stated:

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[6] The Senate Policy elaborates on the amorphous meaning of each of the five criteria. This elaboration is reprinted in Petitioners' Appendix H, pp. 59-61.

[7] PA49-50; JA241 (emphasis added). *See Snitow v. Rutgers*, 103 N.J. at 122, 510 A.2d at 1121 (" '[T]he peer review system has evolved as the most reliable method for assuring promotion of the candidates best qualified to serve the needs of the institution.' ").

[8] The Senate Policy commented:

> The most critical step in the promotion process is the step from assistant professor to associate professor, since this appointment normally involves academic tenure and means in effect that the University has abandoned its *freedom of action* with respect to the retention of a particular individual. After one has attained an associate professorship, he or she still has freedom to resign, but the University *no longer has freedom to dismiss, except for cause* set forth in charges and proved before an appropriate committee of peers.
>
> For this reason *the greatest care* should be exercised in promoting faculty members to the rank of associate professor. To attain this rank, a person must be adjudged to be someone who can be counted on to participate with colleagues in the determination for [sic] formulation of University policy and development with respect to his or her field of scholarship. There is probably *something rather different in kind as well as in quality* to be sought in an associate professor as distinct from an assistant professor.
>
> In the case of suggested promotions to rank carrying with it academic tenure, it is desirable to obtain comparisons of a person's effectiveness with respect to colleagues in this University, and also professional stand-

> Those faculty members who have made *the most important contributions* to the University and have discharged their duties with *the greatest distinction will be considered for promotion.* *** *Advancement to a higher rank is not automatic.* [PA49; JA240 (emphasis added)]

The University Senate Statement on Tenure reminds the faculty that the award of *tenure "is not an automatic right"* and that the educational needs of the University must be weighed before tenure is granted.[9]

When a faculty member is being evaluated for promotion to or within the tenured ranks, the evaluation process normally commences at the departmental level. A departmental peer review committee, composed of the department chair and all tenured members of the department at or above the academic rank for which the individual is being considered for promotion and tenure, meets for the purpose of evaluating and deciding whether to recommend the candidate for promotion and tenure. The peer review committee's aggregate recommendation, based on the committee members' individual review and subjective evaluation of the evidence, along with its narrative summary of the candidate's performance, are reported on Form No. 4, Part A. PA47, 49; JA206, 219-229, 236, 248-249, 258-260.

In reaching its decision, each evaluator reviews the candidate's promotion packet. The candidate may submit for inclusion in the promotion packet his *curriculum vitae*, a list of potential outside evaluators, and any other documents or materials he wishes to have considered. With the exception of the external confidential letters of evaluation and the official promo-

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ing with respect to colleagues in the relevant field elsewhere. [PA50-51; JA242 (emphasis added)]

[9] PA52; JA246 (emphasis added). The educational needs of the University are based on numerous parameters, such as program priorities, long-range planning, fiscal resources, and faculty mix (PA52-54; JA246-247). The University Senate has noted that Regulation 3.30, by its very nature, has to be general because, in part, "the divisions of the University which have different goals, functions, and specialty areas must formulate their own policies, within the framework of the statute, to ensure equitable treatment for their respective members" (JA239).

tion forms, the candidate is provided with a copy of all documents that are added to the promotion packet and is permitted to submit written responses or rebuttals to those documents.[10]

Following the completion of the departmental evaluation, the department chair, based on his review of the evidence and the subjective criteria, enters his own independent summary statement (including his recommendation) regarding the candidate's qualifications for promotion and tenure on Form No. 4, Part B. The department chair will notify the candidate, in writing, of the peer review committee's recommendation. JA206, 223, 228-230, 236, 261, 269, 272.

The Appointments and Promotions ("A&P") Committee then reviews the entire promotion packet and, in view of the subjective criteria, makes its own independent evaluation and recommendation regarding the candidate's qualifications for promotion and tenure on Form No. 5. The dean, after consideration of the complete promotion packet and the subjective criteria, makes his own independent recommendation on Form No. 6. Where applicable, the appropriate University-wide peer Section committee meets to independently evaluate the candidate's research accomplishments, scholarly/creative activities, and professional activities. The Section committee's independent recommendation is reported on Form No. 7. PA47, 49; JA219-220, 223, 229-231, 236, 263-267, 574-578.

The next level of review is the Promotion Review Committee ("PRC"), which is composed of the three campus Provosts, four senior members of the faculty, and the Executive Vice President. "The function of the [PRC] is to advise the President from a University-wide perspective on reappointments involving award of tenure and on promotions to or within the tenured ranks" (JA231). Members of the PRC do not participate at any other level of the evaluation process. PA49; JA220, 231, 236.

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[10] JA223-228, 268-271, 296-299. At the conclusion of the promotion process a faculty member is provided access to the official promotion forms. JA277, 285-289, 296-299.

Each PRC member individually studies the promotion packet in light of the criteria for evaluation, examines the basis and rigor of the judgments made at the earlier levels of review, and reaches an independent judgment on the candidate's suitability for promotion and tenure. The members of the PRC then meet to "discuss their assessments of the evidence, and in light of this discussion, they vote on the basis of their individual judgments concerning the proposed action" (JA232). If the official packet is found to be deficient, the PRC remands the matter to the appropriate level for completion and the matter is reprocessed through each intervening level of review. The PRC reports its independent recommendation in a memorandum addressed to the President. JA220, 223, 231-232, 236.

Finally,

> [a]fter considering all the evidence from these diverse sources, the President makes his own recommendations for reappointments and/or promotions involving the tenure ranks to the Board of Governors. The Board of Governors also considers all available information in reaching its own, final decision. [JA232]

All recommendations for promotion and tenure are merely advisory and are not binding on the Board of Governors; only the Board of Governors has the authority to promote a faculty member to or within the tenured ranks.[11] Each nontenured faculty member's employment contract explicitly states: "Academic tenure is conferred upon eligible faculty members solely by action of the Board of Governors of Rutgers—The State University. No administrative officer of the University has the authority to promise or to award such status to anyone under any circumstances" (JA597). Moreover, the evaluators at each level of review exercise independent judgment. "[T]hat is, judgments at each level should be based on all the evidence submitted to that level and should not merely rely on, or concur in, judgments at earlier levels" (JA223).

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[11] JA202, 219-220, 597; N.J.S.A. 18A:65-25(h); *Kovats v. Rutgers, The State Univ.*, 633 F. Supp. 1469, 1479 (D.N.J. 1986), *aff'd*, 822 F.2d 1303 (3d Cir. 1987); *Snitow v. Rutgers*, 103 N.J. at 122-23, 510 A.2d at 1121-22.

The faculty member concerned is given prompt notice of the final action taken in the review process. The faculty member may request from the dean a written explanation of the reasons for his non-reappointment or non-promotion. A disappointed faculty member may also invoke the detailed and comprehensive grievance procedures that are set forth in the Agreement. If the grievance is sustained, the University is required to rectify the defect that arose during the first tenure review and reevaluate the candidate.[12]

REASONS WHY THE PETITION SHOULD BE DENIED

THE DETERMINATION BELOW THAT PETITIONERS DO NOT HAVE A CONSTITUTIONALLY-PROTECTED PROPERTY/LIBERTY INTEREST IN THE TENURE REVIEW PROCEDURES AND CRITERIA IS IN COMPLETE ACCORD WITH THE DECISIONS OF EVERY OTHER CIRCUIT THAT HAS ADDRESSED THE ISSUE AND THE CONSTITUTIONAL PRINCIPLES SET FORTH BY THIS COURT.

After reviewing the documents governing the grant of tenure at the University, the courts below were compelled to come to the legal conclusion they reached. The governing documents, with clarity and no equivocation, provide that the decision to grant tenure is inherently subjective and solely within the discretion of the Board of Governors (PA10-11). The courts below correctly observed that the University's tenure review procedures and criteria simply did not "restrict the traditional discretion of university officials to make tenure awards" (PA15).[13]

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[12]JA232, 236, 269-299. *See Snitow v. Rutgers*, 103 N.J. at 123, 510 A.2d at 1122 (University's failure to fashion an appropriate remand remedy is grievable).

[13]Indeed, any such restriction would violate the express and unequivocal public policy of New Jersey that decisionmakers have unrestricted latitude with respect to tenure decisions. The New Jersey Supreme Court so stated in *Cammarata v. Essex County Park Comm.*, 26 N.J. 404, 412, 140 A.2d 397, 401 (1958):

Not surprisingly, every other circuit court to address the issue is in agreement. In *Goodisman v. Lytle*, 724 F.2d 818, 821 (9th Cir. 1984), the Ninth Circuit held that procedural steps and substantive guidelines for tenure review (such as "outstanding ability in teaching or research", "respect from colleagues", and "substantial contributions . . . to the University") do not create a constitutionally-protected interest triggering the due process clause:

> These guidelines do not significantly limit University officials' discretion in making tenure decisions. They provide only an outline of relevant considerations. They do not enhance a candidate's expectation of obtaining tenure enough to establish a constitutionally protected interest.

Similarly, in *Beitzell v. Jeffrey*, 643 F.2d 870, 875-76 (1st Cir. 1981), the First Circuit stated:

> Given the university's overall mission, the creation and transmission of knowledge, the very need for strong procedural protections to prevent the wrongful dismissal of a tenured teacher concomitantly suggests a need for wide discretion in making an initial tenure award. *** [T]he initial decision to grant tenure, like various other academic mat-

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> It is difficult to evaluate the character, industry, personality, and responsibility of an applicant from his performance on a written examination or through cursory personal interviews. Knowledge and intelligence do not alone make a good policeman. The crucial test of his fitness is how he fares on the job from day to day when suddenly confronted by situations demanding a breadth of resources and diplomacy. Many intangible qualities must be taken into account, and, since the lack of them may not constitute good cause for dismissal under a tenure statute, the park commission is entitled to a period of preliminary scrutiny, during which the protection of tenure does not apply, in order that it may make pragmatically informed and *unrestricted decisions* as to an applicant's suitability. [emphasis added]

This "same thoughtful philosophy applies with manifold emphasis to the selection of school teachers." *Zimmerman v. Bd. of Ed. of Newark*, 38 N.J. 65, 73, 183 A.2d 25, 30 (1962), *cert. den.*, 371 U.S. 956 (1963). *Accord Assoc. of N.J. State College Faculties v. Dungan*, 64 N.J. 338, 351, 316 A.2d 425, 432 (1974).

> ters, typically calls for the exercise of subjective judgment, confidential deliberation, and personal knowledge of both the candidate and the university community. *** These facts suggest why it would be objectively unreasonable for a probationary teacher to rely upon an award of tenure. *** And, they suggest the inappropriateness of courts determining what procedures universities ought to follow in making initial tenure awards.
>
> * * *
>
> [T]hose criteria did not set objective standards conferring an automatic right to tenure, nor did they create a reasonable expectation of receiving it. Rather, they simply reiterated the traditional criteria for promotion at universities: teaching, scholarship, and service. *** Aside from the mere existence of these criteria, there is not a word in the record suggesting that [the university's] "tenure" was meant to be granted routinely or to be withheld only for "cause", nor is there a word suggesting that the tenure procedure was meant to be less judgmental or subjective than elsewhere. [footnotes omitted]

No circuit has reached a contrary result. *See, e.g., Lovelace v. Southeastern Massachusetts Univ.*, 793 F.2d 419, 422, 424 (1st Cir. 1986) ("[b]y specifying in writing the usual criteria for promotion . . . a university does not thereby set objective criteria, constricting its traditional discretion or transforming a largely judgmental decisional process into an automatic right to, or property interest in, tenure"; fact that all prior tenure candidates were granted tenure does not create a protected property interest); *Kilcoyne v. Morgan*, 664 F.2d 940, 942 (4th Cir. 1981) (no property interest in university's tenure procedures and criteria), *cert. den.*, 456 U.S. 928 (1982); *Weinstein v. Univ. of Illinois*, 811 F.2d 1091, 1097-98 (7th Cir. 1987) (same, adding that "[t]he rule of law is clear enough that even a wilfully blind litigant cannot misunderstand"); *Wu v. Thomas*, 847 F.2d 1480, 1485 (11th Cir. 1988) ("a prospective promotion [in rank at a university] is not a property or liberty interest protected by the fourteenth amendment"); *Anderson v. City of Philadelphia*, 845 F.2d 1216, 1221 (3d Cir. 1988) (where the criteria for appoint-

ment or promotion are subjective and discretion is vested in the decisionmaker, a candidate for employment or promotion simply cannot have a tenable claim of entitlement to employment or promotion); *Griffith v. F.L.R.A.*, 842 F.2d 487, 496-501 (D.C. Cir. 1988) (the subjective nature of the governing criterion, the legislature's specific vesting of decisionmaking authority regarding promotions in the agency head, the fact that a promotion is involved, and the manifest need for flexibility combine to compel the conclusion that an employee has no protected property interest in merit pay increases/promotions); *Schwartz v. Mayor's Comm. on Judiciary of N.Y.*, 816 F.2d 54, 57 (2d Cir. 1987) (neither the mandatory procedures utilized by a judicial screening committee nor the fact that most incumbent judges had previously been reappointed create a property or liberty interest); *Dorr v. County of Butte*, 795 F.2d 875, 877-78 (9th Cir. 1986) ("[t]he power of the appointing authority to determine, on a purely subjective basis, whether a probationary employee has performed satisfactorily undercuts any expectation of continued employment"); *Graham v. Oklahoma City*, 859 F.2d 142, 146 (10th Cir. 1988) (a personnel manual setting forth circumstances constituting cause for discharge does not create a property interest in continued employment where statute vests supervisor with discretionary authority to determine whether an employee should be retained or dismissed); *Wells v. Bd. of Regents of Murray State Univ.*, 545 F.2d 15, 16-17 (6th Cir. 1976) (nontenured faculty members do not have protected property interests in continued employment where state law places exclusive authority in the Board of Regents to grant tenure and a formalized tenure procedure is in place); *Booher v. U.S. Postal Service*, 843 F.2d 943, 943-44 (6th Cir. 1988) (postal regulation allegedly requiring supervisor to advise probationary employee of his shortcomings and provide him an opportunity to conform does not give said employee a protected property interest in continued employment); *Samad v. Jenkins*, 845 F.2d 660, 663 (6th Cir. 1988) (faculty member does not have a protected property interest in being granted emeritus status where the grant of such status is within the discretion of his peers); *Stow v. Cochran*, 819 F.2d 864, 866-69 (8th Cir. 1987)

(procedural guidelines governing disciplinary actions, including discharge, and/or unauthorized oral assurances do not create a protected property interest in continued employment; *Lovelace, Weinstein,* and *Dorr* followed); *Yeghiayan v. U.S.*, 649 F.2d 847, 851-53 (Ct. Cl. 1981) (an administrative regulation enumerating grounds for separation of nontenured employees cannot limit the full scope of the discretion that the legislature has vested in the hiring authority; therefore, said employees do not have protected property interests in continued employment); *Banerjee v. Bd. of Trustees of Smith College*, 495 F. Supp. 1148, 1160-61 (D.Mass. 1980) (the fact that plaintiff was "measured against a more rigorous standard for tenure" than used in the past reflected the needs of the defendant-college to be more selective as the pool of qualified tenure candidates expanded and to avail itself of an opportunity to strengthen its faculty), *aff'd*, 648 F.2d 61 (1st Cir.), *cert. den.*, 454 U.S. 1098 (1981); *Clark v. Whiting*, 607 F.2d 634, 639-44 (4th Cir. 1979) (a university is not constitutionally required to apply same standards in evaluating plaintiff as it used "in the past" with respect to earlier candidates: "[a] teacher's competence and qualifications for tenure or promotion are by their very nature matters calling for highly subjective determinations, determinations which do not lend themselves to precise qualifications and are not susceptible to mechanical measurement"); *Davis v. Oregon State Univ.*, 591 F.2d 493, 495-96 (9th Cir. 1978) (oral assurances that tenure is granted as a matter of course do not create a property interest where the governing documents provide that tenure is not automatic and vests final authority to grant tenure in the president); *Upadhya v. Langenberg*, 834 F.2d 661, 663-67 (7th Cir. 1987) (oral assurances regarding length of employment, although accurate depictions of the past practices, "do not transmute probabilities into entitlements", particularly when the university regulations provide that nontenured faculty have contracts of limited duration and that only the president and board of trustees have the authority to bind the university to longer-term appointments), *cert. den.*, 486 U.S. , 108 S.Ct. 2016, 100 L.Ed.2d 603 (1988); *Fluker v. Alabama State Bd. of Ed.*, 441 F.2d 201, 207 (5th Cir. 1971) (plaintiffs were not

deprived of due process by failure of the university to apprise them of the standards for continued employment: "Appellants' proposal of this requirement also ignores the highly subjective nature of employer-employee relationships. *** [T]here are an enormous number of fact situations in which the nonreappointment of an employee may be justified by highly subjective and perhaps unforeseeable considerations.").

As a review of the Regulations, the Instructions, and the Agreement reveals, the procedures and criteria set forth in those documents, like those in the foregoing cases, do not in any way restrict the University's discretion in tenure matters.[14] Instead, the procedures and criteria serve as guidelines for the University to utilize when exercising its sole authority to make academic judgments in the evaluation process. Nothing in the record demonstrates that by setting forth procedures and subjective criteria for tenure review decisions, the University intended to relinquish its normal discretion and academic judgment in deciding (a) what procedures and criteria should be followed in making tenure awards and (b) who should be awarded tenure. Simply put, the University has advised probationary faculty members that they *may be* considered for tenure and has clearly stated that tenure is *not* an automatic right. The record and case law, both discussed in detail above, overwhelmingly compel the conclusion that the University has not relinquished its discretion. The law in New Jersey clearly places the University's academic responsibility for tenure on one and only one body, the Board of Governors. And, the record before this Court so demonstrates.

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[14]As petitioners readily admit (pp.13-19), their entire due process case is premised on a series of cases dealing with prisoner releases, transfers, and paroles. *See, e.g., Board of Pardons v. Allen*, 482 U.S. , 107 S.Ct. 2415, 96 L.Ed.2d 303 (1987); *Greenholtz v. Inmates of Nebraska Penal & Correctional Complex*, 442 U.S. 1 (1979). As the courts below ably noted, these cases not only are inapposite (PA9), but also further demonstrate that the tenure review procedures and criteria do not restrict the University's traditional discretion in such a manner as to give a tenure candidate a property/liberty interest in the tenure process or tenure itself (PA15). Nothing in the tenure review procedures and criteria evidences an intent to significantly limit the University's discretion or a requirement that all candidates that meet the five criteria of Regulation 3.30 must be granted tenure.

To accept petitioners' "automatic tenure" argument (PA56) would pervert the entire tenure system—as it exists at the University and other major research universities—and would directly contravene the documents governing employment at the University and the clear public policy of New Jersey. There is an inherent difference between tenured and nontenured faculty. For a tenured faculty member, "termination" or "discharge" must be based on adequate cause. However, a nontenured faculty member, at the end of his contract period, need not be rehired—no showing of adequate cause is required before a nontenured faculty member is not offered reemployment. What petitioners now seek here for nontenured faculty is *de facto* tenure, *i.e.*, that they cannot be discharged without adequate cause. Such a contention was rejected by this Court in *Board of Regents v. Roth*, 408 U.S. 564 (1972). In that case, the Court noted that none of the university documents provided that a nontenured faculty member would be rehired absent sufficient cause; such a contention was untenable because the governing rules provided that discharge for cause was applicable only to tenured faculty. 408 U.S. at 566-67 & n.3, 578. Simply put,

> It is unlikely in the extreme that an institution which has a formal tenure policy stated with precision in writing in a generally circulated and available faculty handbook has also developed an altogether inconsistent informal policy.[15]

This Court has made it clear that to have a property interest, petitioners clearly must have more than a subjective or "unilateral expectation" of receiving a specific benefit; they must, instead, have a "legitimate claim of entitlement" to it. *Roth*, 408 U.S. at 577. That claim must be based, at a minimum, on

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[15] *Sabet v. Eastern Virginia Medical Auth.*, 775 F.2d 1266, 1270 (4th Cir. 1985). *Accord Beitzell*, 643 F.2d at 876-77; *Cusumano v. Ratchford*, 507 F.2d 980, 984 (8th Cir. 1974) (the entire thrust of a formalized tenure provision is to prevent the creation of *de facto* tenure from some unwritten "common law" in a particular university), *cert. den.*, 423 U.S. 829 (1975); *Davis*, 591 F.2d at 495-96 (oral assurances regarding tenure insufficient where written tenure system exists); *Lovelace*, 793 F.2d at 423-24 (same); *Upadhya*, 834 F.2d at 663-67 (same).

"mutually explicit understandings" between the parties. *Perry v. Sindermann*, 408 U.S. 593, 601 (1972).

As the courts below recognized, there is no *mutually explicit* understanding between the individual petitioners and the University regarding "automatic" tenure.[16] None of the published documents provide (a) that nontenured faculty members are automatically entitled to tenure or (b) that nontenured faculty members must be rehired unless adequate cause for nonrenewal exists. The documents—in accordance with the mandate of New Jersey public policy[17]—clearly provide just the

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[16] Petitioners cannot cite to any documents that state that they have an automatic right to tenure. The only source they cite for this automatic tenure argument is an affidavit from Professor Keddie (PA56), the vast majority of which contains mere conclusory statements and hearsay. Petitioners did not present an affidavit from any member of the purported plaintiff class — including Ms. Varma, *the* class representative — that demonstrated that a class member in fact had this common understanding of automatic tenure and the source thereof. As the courts below held, the abstract, conclusory statements in Professor Keddie's affidavit were not sufficient to defeat respondents' summary judgment motion. Fed. R. Civ. P. 56(e); *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586-87 (1986). Moreover, even if the deficiencies in the Keddie affidavit are overlooked, that affidavit simply does not establish that there was a *mutually explicit* understanding between any class member and the University.

[17] The New Jersey Supreme Court has already rejected a plaintiff-union's argument that satisfactory classroom or professional performance mandates the award of tenure to faculty members. *Assoc. of N.J. State College Faculties v. Dungan*, 64 N.J. at 351, 316 A.2d at 432; *accord Zimmerman v. Bd. of Ed. of Newark*, 38 N.J. at 73-75, 183 A.2d at 29-31 (plaintiff's proffer of testimony of school principal to the effect that tenure would "automatically" follow when a teacher has received satisfactory ratings rejected as contrary to the law of New Jersey). In *Dungan*, the Supreme Court noted:

> Historically many considerations other than unsatisfactory classroom or professional performance have entered into discretionary determinations not to afford tenure and the determinations have not been interfered with judicially. *** [T]he educational priorities and institutional needs may properly be considered, along with the pertinent individual factors, in determining whether to grant tenure.

64 N.J. at 351-52, 316 A.2d at 432-33. The Supreme Court also took note of the accepted principle that an academic institution of higher education simply cannot grant tenure to all candidates who otherwise meet the requirements for tenure:

opposite: tenure is *not* automatic. The documents expressly provide that it is the tenured professor—not the nontenured faculty member—who has indefinite tenure and who can be dismissed only for adequate cause. The practice at the University simply reflects the reality of higher education: meeting the minimum standard of performance does not guarantee that tenure will be granted.[18]

Petitioners attempt to circumvent the foregoing case law by arguing that they have a liberty interest that has been wrongfully deprived by respondents. According to petitioners, this liberty interest includes the right to future employment as a Rutgers faculty member and the right to free speech (pp. 21-23).[19]

As the courts below recognized (PA13-15), the simple fact of the matter is that this Court, in *Roth* and *Sindermann*, rejected the existence of such liberty interests. First, in *Roth*, the Court noted two situations in the context of employment where the liberty interest would be "implicated": (1) " '[w]here a per-

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"[A]n institution in which all faculty members are tenured would find itself in an intolerable situation." It would "quickly stagnate internally and lose most, if not all, of its ability to develop and change over time, consistent with its need to be responsive to the society in which it exists." It must retain "a degree of flexibility in the allocation of its faculty resources" so that it may start new programs, introduce young scholars, and meet urgent social policy by conduct such as active recruitment of "minority and female faculty members."

64 N.J. at 342, 316 A.2d at 427-28.

[18] *See, e.g., Faro v. New York Univ.*, 502 F.2d 1229, 1232 (2d Cir. 1974) (in all walks of life, especially in businesses and the professions, of the numerous equally-qualified candidates, only one may be selected for tenure, or partnership, or vice-presidency, or judicial clerkship); *Banerjee*, 495 F. Supp. at 1155-56, 1160 (among a group of tenure candidates there will be faculty members "as to whom both a decision granting tenure and a decision denying tenure could be justified as a reasonable exercise of discretion by the tenure-decisionmaking body."); *Keddie*, 412 F. Supp. at 1269, 1274 (a university need not rehire faculty members who are merely competent; rather, the institution may limit tenure to those candidates who, subjectively, are deemed to be excellent).

[19] Petitioners' assertion that they have been deprived of academic freedom (pp.21-22) is not supported in the record by any competent evidence.

son's good name, reputation, honor, or integrity is at stake because of what the government is doing to him,' " and (2) where the State "imposed on him a stigma or other disability that foreclosed his freedom to take advantage of other employment opportunities." 408 U.S. at 573. Respondents have not published any charges of moral turpitude—such as dishonesty or immorality—against petitioners that have defamed them.[20] And respondents have not barred the petitioners from seeking employment at *other* state institutions of higher education in New Jersey or elsewhere.[21] Mere proof that petitioners' record of nonretention at the University "might make [them] somewhat less attractive to some *other* employers would hardly establish the kind of foreclosure of opportunities amounting to a deprivation of 'liberty.' "[22]

Second, this Court specifically rejected the argument advanced by petitioners that a due process liberty interest exists

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[20] *Roth*, 408 U.S. at 573; *Keddie*, 412 F. Supp. at 1274 (nonrenewal on the basis of either professional incompetence or non-excellent performance does not implicate liberty interest); *Beitzell*, 643 F.2d at 878 ("the discussion of Beitzell's tenure credentials—whether he is an adequate teacher, scholar, member of the university community—[does not] threaten his reputation. . . . Such discussions accompany many, if not all, decisions to hire, or to promote, as well as to discharge, an employee"). No such wrongful conduct has been alleged by petitioners.

[21] *Roth*, 408 U.S. at 573; *Bishop v. Wood*, 426 U.S. 341, 348 (1976). Petitioners alleged that the denial of future employment *at Rutgers* violates due process (p. 23). If that were true, then every time a nontenured employee is denied tenure—*i.e.*, future employment—there would be a due process violation. *Roth* and *Bishop* clearly rejected that argument. Moreover, in New Jersey there are numerous other state institutions of higher education: New Jersey Institute of Technology, University of Medicine and Dentistry of New Jersey, and extensive state and community college systems.

[22] *Roth*, 408 U.S. at 574 n.13 (emphasis added). *Accord Keddie*, 412 F. Supp. at 1274; *Beitzell*, 643 F.2d at 878. *See Faro*, 502 F.2d at 1232 (a faculty member denied tenure "is in no way different from hundreds of others who find that they have to make adjustments in life" when their career goal (such as tenure or partnership) is not fulfilled); *Schwartz*, 816 F.2d at 57 (failure to be reappointed to a judgeship does not implicate a liberty interest).

where petitioner is allegedly discharged for exercising his right of free speech.[23] In sum, plaintiffs have not been deprived of any liberty interest.

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[23] *Roth*, 408 U.S. at 575 n.14; *Sindermann*, 408 U.S. at 599 n.5. Indeed, one court recently noted that "[j]udicial interference with a university's selection and retention of its faculty would be an interference with academic freedom." *Weinstein*, 811 F.2d at 1097 n.4. *See Snitow v. Rutgers*, 103 N.J. at 122, 510 A.2d at 1121 ("'"[T]he four essential freedoms" of a university' have been said to include the freedom 'to determine for itself on academic grounds who may teach, what may be taught, how it shall be taught, and who may be admitted to study.' "), *quoting Sweezy v. New Hampshire*, 354 U.S. 234, 263 (1957) (Frankfurter, J., concurring). Moreover, petitioners' reliance (p.21) on University documents concerning academic freedom as the source for their free speech claim is misplaced. Any alleged violation of the University's academic freedom guidelines would at most give rise to "a contract claim, not a constitutional one". *Lovelace*, 793 F.2d at 426 n.2.

CONCLUSION

For these reasons, the petition for writ of certiorari should be denied.

Respectfully submitted,

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